TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CASES

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF CASES (Continued)

TABLE OF CASES (Continued)

LEGISLATIVE MATERIALS

TABLE OF CASES (Continued)

OTHER SOURCES

TABLE OF CASES (Continued)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 471

THE CITY OF GREENWOOD, MISSISSIPPI,

Petitioner

versus

WILLIE PEACOCK, ET. AL.

No. 649

WILLIE PEACOCK, ET. AL.

Petitioners

versus

THE CITY OF GREENWOOD, MISSISSIPPI

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the District Court below relative to the *Peacock* portion of this consolidated case is found at page 9 of the record. The *Weathers* opinion is at page 67 of the record. These opinions are unreported. However, the Court of Appeals opinion in *Peacock* by Judge Bell, found at page 21 of the record, is reported

in 347 F. 2d at 679. The *Weathers* Appellate opinion is per curiam and unreported. It is found at page 96 of the record.

JURISDICTION

The original judgments of the Court of Appeals for the Fifth Circuit were entered on June 22nd, 1965 (*Peacock*) and on July 20th, 1965 (*Weathers*). No petition for a re-hearing was filed and applications for writs of certiorari were made by the City of Greenwood on August 19, 1965, and by *Peacock*, et. al., on October 5, 1965. Certiorari was granted January 17, 1966. This Court has jurisdiction of this matter under title 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED HEREIN

1. The supremacy clause of the Constitution of the United States (Article VI) and the Fourteenth Amendment to that Constitution are both involved herein.

2. The following statutes are also involved:

28 U.S.C. §1443(1964):

§1443. Civil rights cases.

Any of the following civil actions or criminal prosecutions commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied, or cannot enforce in the courts of such State, a right

under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

28 U.S.C. §1446(a) (1964):

§1446. Procedure for removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State Court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

Mississippi Code §2296.5

"It shall be unlawful for any person or persons to wilfully obstruct the free convenient and normal use of any public sidewalk, street, highway, alley, road, or other passageway by impeding, hindering, stifling, retarding or restraining traffic or passage thereon, and any person or persons violating the provisions of this act shall be guilty of a misdemeanor."

QUESTIONS PRESENTED

I A) Whether a removal petition which alleges a racially-motivated arrest, charge and prosecution of civil rights workers peacefully engaged in a campaign to register Negro voters, which arrest is alleged to be designed to harass and intimidate such workers, states a case for removal under title 28USC§1443 (1964). (covered in part IA) of the argument)

I B) Whether as a matter of pleading a removal petition that alleges a racially-motivated arrest, charge and prosecution, designed to suppress Negro voter registration activity, sufficiently describes a denial of an equal civil right and/or an inability to enforce in the courts of the state a right under a law providing for equal civil rights so as to set forth a case for removal. (covered in Part IB) of the Argument)

II A) Whether a removal petition which alleges that Negroes are administratively excluded from juries which will try such state-charged petitioners, arrested while assisting Negoes to register to vote, describes an inability to enforce in the courts of that state a right under a law providing for the equal civil rights of citizens, thereby stating a case for removal under Title 28USC§1443(1). (covered in part IIA) of the Argument)

II B) Whether a petition which alleges that state jury selection laws as written are unconstitutional and exclude females and Negroes from service on juries that will try state-charged petitioners describes an inability to enforce in the courts of that state a right under a law providing for the equal civil rights of citizens, thereby stating a case for removal under Title 28 USC§1443-(1). (covered in Part IIB) of the Argument)

III Whether a petition that alleges civil rights workers were arrested and charged by the state for assisting Negroes to register to vote in Mississippi are thereby prosecuted for an act performed under color of authority derived from the Fourteenth Amendment and the Civil Rights Acts of 1957 and 1960, and additionally for refusing to do an act, i.e., for desisting, on the ground that it would be inconsistant with such equal federal laws, all within the meaning of Section 1443(2), sets forth a case for removal. (covered in part III of the Argument)

STATEMENT OF THE CASE

The fourteen petitioners in the *Peacock* case were all arrested on March 31, 1964, by city officials in the City of Greenwood, Mississippi, and charged with violating Section 2296.5 of the Mississippi Code Annotated of 1942. Petitioners, who were all members of the Student Non-Violent Coordinating Committee, were arrested while picketing the LeFlore County Court House, and were charged with obstructing public streets. On April 3, 1964, before trial in the Police Court of the City of Greenwood, Mississippi, petitioners filed removal petitions in the United States District Court for the Northern District of Mississippi (Greenville Division), alleging jurisdiction under both sub-sections of 28 U.S.C. 1443. Petitioners alleged that they were members of the Student Non-Violent Coordinating Committee, affilated with the Council of Federated Organizations, both civil rights groups. Petitioners further alleged that at the time of their arrest they were engaged in a voter registration drive in LeFlore County, Mississippi, assisting Negroes to register so as to enable them to vote. They further alleged that they could not enforce their rights under the First and Fourteenth Amendments of the Federal Consti-

tution to be free in speech to petition and to assemble, that they were denied the equal protection of the laws, the privileges and immunities of the laws and the due process of law, inasmuch as, among other things, they were arrested, charged and were to be tried under a state statute which was vague, indefinite and unconstitutional on its face, and was unconstitutionally and arbitrarily applied and used, and was enforced in the instance of their arrest as "a part and parcel of the unconstitutional and strict policy of racial segregation of the State of Mississippi and the City of Greenwood." Because of the aforementioned, petitioners finally alleged, they were denied and/or could not enforce in the courts of the State of Mississippi the rights they possess providing for equal protection and equal rights. Petitioners invoked the application of both sub-sections of 28 USC. Section 1443.

The *Weathers* case also involved criminal cases removed from the Police Court of the City of Greenwood, Mississippi, under authority of 28 U.S.C. 1443, subsections 1 and 2. In that case there are fifteen applicant-petitioners who were arrested at various times during the month of July, 1964, and charged with the following offenses: parading without a permit in violation of an ordinance of the City of Greenwood, Mississippi, enacted June 21, 1963, and recorded in Minute Book 55 at page 67 of the Records of Ordinances of the City of Greenwood, Mississippi; contributing to the delinquency of a minor in violation of Section 6185-13 of Mississippi Code Annotated of 1942; the use of profane and vulgar language in violation of Sections 2089.5 and 2291 of the Mississippi Code Annotated of 1942; disturbance in a public place; disturbing the peace in violation of Section

2089.5 of the Mississippi Code Annotated of 1942; assault; assault and battery; inciting to riot; operating a motor vehicle with improper license tags in violation of Sections 9352-21 and 9352-24 of the Mississippi Code Annotated of 1942; interfering with a police officer in the performance of his duty; and reckless driving.

Some of the petitioners in the *Weathers* case are charged with more than one of the offenses listed above, and some of them jointly filed one petition for removal. Petitioners' petitions for removal in the *Weathers* case allege different facts, but with respect to 28 U.S.C. Section 1443(1) they allege that petitioners cannot enforce their equal civil rights under the Fourteenth Amendment in the courts of the state for the following reasons, to wit: Mississippi courts and law enforcement officers are committed to a policy of racial segregation and are prejudiced against petitioners; under Mississippi law, custom and practice racially segregated court rooms are maintained; in Mississippi court rooms Negro witnesses and attorneys are addressed by their first names; local counsel are unavailable to petitioners and Mississippi courts are closed to out-of-state attorneys; Mississippi judicial officials are elected by elections in which Negroes have been denied the right to vote; and Negroes are systematically excluded from jury service. The petitioners also alleged that they were entitled to remove their cases to federal court under the authority of 28 U.S.C. Section 1443(2).

In both the *Peacock* and *Weathers* cases, the City of Greenwood filed motions to remand, which were sustained by the United States District Court for the Northern District of Mississippi (Greenville Division) on the grounds that the said petitions did not state a removable

case under either subsection of 28 U.S.C. Section 1443. The District Court refused to order an evidentiary hearing on the allegations of the petitions.

The petitioners in both cases appealed to the United States Court of Appeals for the Fifth Circuit, which court, after issuing a stay order in the *Peacock* case (decided before the 1964 Civil Rights Act permitted an appeal of a remand order) entered judgment in *Peacock* on June 22, 1965. The Court of Appeals in the Peacock case affirmed the District Court's holding regarding Section 1443(2) but reversed its holding under Section 1443(1) and therefore remanded that case to the District Court for a hearing on the truth of the allegations in the petitions for removal. The Court of Appeals refused to consider petitioners' allegation that the Statute under which they were charged was vague and indefinite because the District Court did not reach the question, but held that the unconstitutional application by State Officials of a State Criminal Statute valid on its face in such a manner as to violate a person's rights under the equal protection clause of the Federal Constitution is sufficient to entitle such person to remove his case to Federal Court. The Court interpreted certain Supreme Court decisions ending with *Kentucky v. Powers*, 1906, 201 U.S. 1, 50 L. Ed. 633, holding that, in order to establish removal jurisdiction, the denial of equal rights through the systematic exclusion of Negroes from Grand and Petit juries must result from State legislative or constitutional provisions. Interpreting 28 U.S.C. 1443 Subsection (2), the court held that this section is limited to Federal officers and those assisting them or otherwise acting in an official or quasi-official capacity and held that this Section does not authorize re-

moval by any person who is prosecuted for an act committed while exercising an equal civil right under the Constitution or laws of the United States.

On July 20, 1965, the Court of Appeals for the Fifth Circuit sustained the petitioners' motion for a summary reversal in the *Weathers* case, holding that the issues in that case were identical with and therefore controlled by the Court's opinion in the *Peacock* case.

In remanding the cases to the District Court for further hearings, the Court of Appeals decided a Federal question, namely, the scope of removal jurisdiction under 28 U.S.C. Section 1443.

Following these decisions of the Court of Appeals in *Peacock* and *Weathers*, the City of Greenwood applied for a writ of certiorari on August 19, 1965. The appellants below filed a cross-petition for certiorari on October 5, 1965, and this Court granted certiorari on January 17, 1966.

ARGUMENT

I

A RACIALLY - MOTIVATED ARREST AND CHARGE, DESIGNED TO USE STATE LAW TO HARASS AND INTIMIDATE CIVIL RIGHTS WORKERS WHO ARE ASSISTING NEGROES IN REGISTERING TO VOTE, PRESENTS A CASE FOR REMOVAL UNDER 28 U.S.C. SECTION 1443(1).

A. In this case the "law providing for the equal civil rights of citizens . . ." is the Fourteenth Amendment. In the decision below, Judge Bell makes three points in regard to this part of the argument. First, he simply states that this is the law involved:

> "It is settled that the equal protection clause of the Fourteenth Amendment constitutes a 'Law providing for the equal civil rights of citizens of the United States' within the meaning of Section 1443(1)."

Secondly, he held that while the due process clause is not such a law providing for equal civil rights, where the claimed denial of an equal civil right is based on race, such a claim meets the test of the removal statute:

> "The removal statute contemplates those cases that go beyond a mere claim of due process violation; they must focus on racial discrimination in the context of denial of equal protection of the laws."

Thirdly, and most importantly, the court below held that mere allegation of an unconstitutional application of state laws so as to deny equal protection because of race is sufficient to meet the whole test of removal:

> "Appellants allege that Mississippi Code Section 2296.5 is being applied against them for purposes of harassment, intimidation and as an impediment to their work in the voter registration drive, thereby depriving them of equal protection of the Laws. We simply hold that these allegations entitle appellants to remove their cases to the federal court."

Of great significance is the fact that the opinion below distinguishes this pre-trial, administrative type of denial from the narrow interpretation given Section 1443 by the *Rives* and *Powers* doctrine[1] and restricts those

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[1] *Virginia vs. Rives*, (1870) 100 U.S. 313, 25 L. Ed. 667; *Kentucky vs. Powers* (1906) 201 U.S. 1, 26 S. Ct. 387, 50 L. Ed. 633, and *Strauder vs. West Virginia et. al.* U.S. 303 (1880).

cases to their bare facts. This holding is elaborated upon in point IIA) which follows.

In essence it should be said that these holdings above set forth recognize the realities of Negro life in Mississippi in 1964-65 and even now. Judges, and especially Federal judges, are not ". . . forbidden to know as judges what [they] see as men." *Hu An Kow vs. Nunan*, 5 Sawy. 552, 560, Fed. Cas. #6546 (1879).

In effect, what Judge Bell was saying was that when a minor state statute is used as a concealed segregation law, the courts will deny the states that use of that law. The federal courts have repeatedly stated that they will strike down, even by the extraordinary writs, sophisticated as well as simple-minded schemes of racial segregation.[2] The State of Mississippi piously complains and in all innocence states that it fails to see a possible connection between obstruction of the public streets and being unable to enforce an equal civil right in the State courts.[3] The most recent decisions of this court have swiftly punctured such bland smugness. In *Brown vs. Louisiana*, (No. 41, October Term, 1965, opinion rendered February 23, 1966), Mr. Justice Fortas does not hesitate to see as a judge what we all know as men, when he says:

> "We need not be beguiled by the ritual of the request for a copy of *'The Story Of The Negro.'* We need not assume that petitioner Brown and his friends were in search of a book for night reading. We instead rest upon the manifest

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[2] *Bush vs. Orleans Parish School Board*, 364 U.S. 500, 81 S. Ct. 260, 5 L. Ed. 2d 245 (194 F. Supp. 182).

[3] See pages 3 and 4 of City of Greenwood's brief below in the Court of Appeals.

fact that they intended to and did stage a peaceful and orderly protest demonstration . . ."

The entire appellate history of this removal statute until *Rachel*[4] found the courts blind to the real meanings of southern rural Negro life and responsive only to beguiling notes of the southern redeemers preaching a new application of an old formalism. This formalism, reflected by the *Gertge*[5] decision, was founded by *Rives* and *Powers* and those cases that followed *Neal vs. Delaware* 103 U.S. 370. This court has consistently looked through many such versions of legal obscurantism and empty formalism to reach the truth. *Dombrowski vs. Pfister* 380 U.S. 479 (1965), *Cox vs. Louisiana*, 379 U.S. 536 (1965). It should be so in this case.

Opposition to the southern Negro freedom movement consistently indulges in the rigid legal formalism required to conceal the true intent of crypto-segregationist statutes such as Section 2296.5 of the Mississippi Code. From the over-frequent use of such banal enactments one would almost be persuaded that the reason Mississippi law enforcement officials are unable to solve the frequent racial homicides in their state is that Mississippi is simply overrun with Negroes wantonly picketing courthouses or unlawfully using profanity.[6]

The real truth, however, is not so lightly stated. The Mississippi statutes used or rather misused here are part and parcel of a rebellious and arrogant defiance of federally-created, and protected, rights by the State of Mis-

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[4]*Georgia vs. Rachel et. al.* 342 F. 2nd 336 (1965).

[5]*Clarksdale vs. Gertge*, 237 F. Supp. 213 (1964).

[6]It is estimated that nearly 3000 civil rights misdemeanor cases still pend in Mississippi State and Federal courts, all left over from the Freedom Summer of 1964 and before.

sissippi. The power structure of that state is doing today what it did one hundred years ago; that is, to erect simple-minded and, when necessary, ingenious ramparts to hold off Federal protection for the Negro.

Although the Mississippi Legislature may have difficulty in legalizing state-taxed whiskey,[7] it is not so naive as to legislate Negroes out of the jury system in exact terms or to specify that only civil rights workers can be arrested for obstructing the city streets. On the other hand, no person should be expected to believe that Negroes serve freely on Mississippi juries,[8] or that civil rights workers are not harassed.[9]

The current formalism of the Southern legal position on civil rights is no more valid than the earlier disreputable formalism of the *Dred Scott* case.[10] It is this nacent, empty, legal formalism that the Court below struck at when it authorized this removal. That part of the opinion should be affirmed.

B. THE PLEADING IS SUFFICIENT.

The pleading herein complained of by the City of Greenwood was found to be sufficient by the Court of Appeals:

> "Under the Precedent of Rachel and the authorities therein cited having to do with notice type pleading, we hold that the removal petitions are adequate at this stage of the proceeding . . .[11]

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[7]See § 2639, Mississippi code taxing alcoholic spirits, the possession of which is made illegal by Mississippi Code § 2613.

[8]U.S. ex rel *Goldsby vs. Harpole*, 236 F. 2d 71 (1959).

[9]*U.S. vs. Wood*, 295 F. 2d 772 (1961); *Dombrowski vs. Pfister*, 227 F. Supp. 56 (1964) (Dissent), 380 U.S. 479 (1965).

[10]*Scott vs. Sandford*, 19 How. 393 60 S. Ct. 691 (1857).

[11]Opinion below, 347 F. 2d 679 at 682.

The petitions clearly allege the expressly unconstitutional character of the statutes sought to be employed by the State,[12] as well as the unconstitutional application of those laws.[13] Admittedly, the language of the *Peacock* petition is more general than *Weathers* but its allegations leave no doubt that at least the petitioners claimed harassment as a Section 1443 (1) ground, and the voting provisions of the 1960 Civil Rights Act (42 U.S.C. 1971) as authority for a Section 1443(2) removal.

The *Peacock* petition allegations that bring into focus 1443(1) are as follows:

> "II. Petitioner is a member of the Student Non-Violent Coordinating Committee affiliated with the Conference [Council] of Federated Organizations, both Civil Rights Groups and was at the time of the arrest engaged in a voter registration drive in Leflore County, Mississippi, assisting Negroes to register so as to enable them to vote as protected under the Federal Constittuion and the Civil Rights Act of 1960, being 42 USCA 1971 et. seq.
>
> III. Petitioner as a citizen of the United States cannot enforce his rights under the first and 14th amendments of the Federal Constitution to be free in speech, to petition and to assemble; is denied the equal protection of the Laws, the privileges and immunities of the Laws and due process of Laws, inasmuch as among other things was arrested, charged and is to be tried under a state statute that is vague, indefinite and unconstitutional on its face; is unconstitutionally and arbitrarily applied and used, and

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12R. 4 for *Peacock*, R. 42, *Weathers*.
13R. 4 for *Peacock*, R. 38-42, *Weathers*.

is enforced in this instance as a part and parcel of the unconstitutional and strict policy of racial segregation of the State of Mississippi and the City of Greenwood."

The main *Weathers* allegations covering subsection (1) are:

"C-1. The arrests and prosecutions of Petitioners have been and are being carried on with the sole purpose and effect of harassing Petitioners and of punishing them for and deterring them from the exercise of their constitutionally protected right to protest the conditions of racial discrimination and segregation which exist in all public aspects of life in Mississippi and which the State of Mississippi now maintains and seek to enforce by statute, ordinance, regulations, custom, usage and practice.

C-2. Among recent legislative enactments evidencing Mississippi's policy to enforce racial discrimination and segregation and to suppress all protest against such discrimination and segregation are Mississippi Code, Section 4065(3), which purports to prohibit the executive officers of the State from obeying the desegregation decisions of the United States Supreme Court, and the several statutes enacted by the 1964 session of the Mississippi legislature which purport to prohibit picketing of public buildings, congregating and refusing to disperse; printing or circulating material which interferes with the operation of a business establishment; printing or circulating material which advocates social equality; the disturbing of the peace of others; giving false statements of complaints to Federal officials; obstructing public streets; encouraging others to remain on private premises of another when forbidden to do so; and statutes

which purport to authorize officials to restrain the movements of groups and individuals and to impose curfews; authorize an increase in the strength of the State Highway Patrol from 274 to 475 men and give the Governor power to dispatch the Highway Patrol into areas on his own initiative; authorize an increase of the maximum penalty for violating a city ordinance from 30 to 90 days imprisonment and a fine of $300; and authorize communities to pool their police forces and equipment.[14]

Additionally, the Weathers petitions refer specifically to jury discrimination,[15] State policy of racial segregation,[16] unfair trial,[17] and lack of counsel,[18] all arguable grounds for removal under Section 1443(1).

The removal statues (28 U.S.C. Section 1446(a) (1964)) require the petition to contain "a short and plain statement of the facts which entitle [the petitioner] . . . to removal." Since 1948 this rule has brought removal practice into line with the notice pleading theories of Rule 8(a) of the Federal Rules of Civil Procedure.[19]

Whether one uses the "short and plain statement" of the *Peacock* petition or the more detailed allegations of the *Weathers* petitions, the pleading requirements of Federal law relative to removal are met in these cases.

II

A. A REMOVAL PETITION WHICH ALLEGES UNCONSTITUTIONAL APPLICATION OF STATE

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[14]In this regard see the list of state voter registration impediments set forth by Mr. Justice Black in his opinion in *U.S. vs. Mississippi*, 380 U.S. 128, 85 S. Ct. 808 (1965) at 810.
[15]R. 41 (C-3-f).
[16]R. 38 (C-3).
[17]R. 39-40 (C-3-a).
[18]R. 40-41 (C-3-b).
[19](See page 117, footnote 17, *Rachel* brief in this Court).

LAWS, INCLUDING JURY SELECTION STATUTES, SO AS TO EXCLUDE NEGROES FROM JURY SERVICE, SETS FORTH A CASE FOR REMOVAL UNDER SECTION 1443(1), TITLE 28 U.S.C.

The issue posed by this headnote is that of the legal and historical validity of the doctrines of *Virginia vs. Rives*, (100 U.S. 313 (1880) and *Kentucky vs. Powers*, 201 U.S. 1 (1906). These cases can be said to severely limit federal removal by holding that the denial of equal protection must appear from explicit state statute or constitutional enactment. Had it not been for these decisions, modern federal practice would have brushed aside such arguments and promptly examined the facts of jury service by Negroes in the jurisdictions concerned. However, because of these cases, we must peruse to consider whether or not a petition that alleges the Negro[20] person or civil rights worker accused by the state cannot enforce in the state courts an equal civil right when Negroes are excluded from the jury by corruption and maladministration, states a case for removal.

This question cannot be considered in a vacuum. While obviously there is no evidence on this point in the record since no hearing was permitted below, the basis for the allegation should be examined. This requires a historical treatment; not only of what Mississippi society has done to the institution of the jury trial, but what it has done to the Negro. Such facts as this treatment may disclose are not evidence, however. They are drawn from sources that include the federal courts as well as historians, and may tell us how and why the historically incorrect doctrines of *Rives* and *Powers* are

[20] R. 39, 40. Also by the Mississisippi Constitution Art. 3 § 31, & Miss. Code §§ 1836-39, petitioners are entitled to a trial by jury.

inconsistent with the experiences of life and legally wrong.

In any consideration of what the Thirty-Ninth Congress had in mind when it passed the third section of the Civil Rights act of 1886, the state of the nation, and of the South of that time, in particular, is important. This subject is considered in the following part.

One final comment by way of introduction is in order. It should be noted that Part B of this second part of the Argument is an alternative attack upon the Mississippi jury system as unconstitutional on its face. A reading of the state statutes will show that Mississippi may not have been as ingenious or competent as some other states in devising a jury selection system that appears racially non-discriminatory, but this should not detract from the fact that the Mississippi laws here considered allow a full-fledged and complete theoretical attack on the *Rives* and *Powers* doctrine.

1) Historically, Mississippi, like West Viriginia in the *Strauder* case,[21] attempted to rebuild the old society of privilege with new forms. Early in the 1865-67 redemption of that state, Negroes were by explicit statute excluded from jury service.[22] After *Strauder* and with communication between Northern Republicans and Southern redeemers restored by the Hayes-Tilden arrangement (and spelled out in detail by *Rives* and *Powers*), that state understood the ground rules. Henceforth, while on the one hand excluding Negroes from the political and judicial life of the State,[23] it presented on the other hand

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[21] *Strauder vs. West Virginia*, 100 U.S. 303 (1880).
[22] *Laws of Mississippi*, 1866-67, pp. 232-233.
[23] Wharton, *The Negro in Mississippi*, (University of North Carolina Press 1947), Chapter XIV.

a fraudulent legal image of strict racial indifference to the nation.[24]

Actually, the ability of the free Mississippi Negro to enforce in his State courts such elemental rights of citizenship as legal personality and the competency to give evidence, was specifically denied in law as early as 1865.[25] The abandonment that year by the Federal Occupying forces of the Freedmens Bureau courts throughout the state[26] was an ominous sign of the larger abandonment of the Negro that occurred in 1877, following the election of Hayes.

The very first attempt by Mississippi to legislate Freedmens rights resulted in the Black Codes of 1865, which in effect re-enacted the slave codes with modifications.[27] These codes prohibited Negroes from holding rural land, and in effect conscripted the Negro into a race of indentured servants. The first post-war Provisional Mississippi Legislature even attempted by resolution to nullify emanicipation and to restore slavery. This proposal received substantial minority support.[28]

Though the Black Codes were repealed in 1867, the Legislature specifically provided that Negroes could not serve on grand and petit juries.[29] This rule was over-

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[24]This image has its modern makers. Professor Silver writes:
"The contention of the Board of Trustees and of University officials, accepted as fact by Judge Mize '. . . that the University is not a racially segregated institution' and that 'the state has no policy of segregation', . . . defies history and common knowledge."
Silver, *Mississippi: The Closed Society* (Harcourt Brace & World, 1964), page 114, *Meredith vs. Fair*, 343 F2d 343 (1963).

[25]Wharton, *op cit.*, pages 76, 77, 134 and 135.

[26]General Orders #13, Vicksburg, October 21, 1865, quoted in Wharton, *op. cit.*

[27]Mississippi Session Laws 1865, paragraphs 86-92.

[28]Constitutional Convention Journal 1865, paragraphs 68-70; see also in this regard, Aptheker; "*Mississippi Reconstruction and the Negro Leader Charles Caldwell*," Science and Society, Vol. XI, No. 4, p. 340, at p. 343.

[29]Laws of Mississippi 1866-67, paragraphs 232-233.

turned only by the order of the Federal Occupational Commander two years later.[30]

Professor Wharton, in his work, *The Negro in Mississippi* (University of North Carolina Press, 1947) at page 137 succinctly describes the plight and history of Negro jurymen in that state:

> "After 1875, the Negroes appeared in smaller and smaller numbers on the jury panels, but their complete elimination did not occur until after 1890. In the constitution of that year it was provided that all persons serving on grand or petit juries must be qualified electors and must also be able to read and write. Thus the elimination of the Negro as a voter served also to remove him from the jury bench, and in a land of white officers, white judges, white lawyers and white juries, the term 'law,' in the Negroes' mind, came more and more to mean only a big white man with a badge."

In his book, *Race Distinctions in American Law* (Appelton, 1910) Gilbert T. Stephenson, at page 259, graphically illustrates the extent to which by 1910, Negroes were excluded from jury service. He quotes from letters solicited from Clerks of Court in Mississippi covering nine counties. The adminstrative method of exclusion set forth is appallingly efficient.[31]

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[30]General Orders No. 32 Appletons Cyclopedia 1864, paras. 455-456. *Vicksburg Daily Times*, April 30, 1869.

[31]A sample from county #6:

". . . In my County we had no Negroes on the jury for the past 15 years or more. We have some 30,000 colored population in this county. . . . and we have only about 175 registered in the county. The board of supervisors, as a rule, does not place their names in the box. . . ."

Sample from County #7:

"1000 white people, 4000 Negroes: . . . we have no Negro jurors in this county at all."

The federal response to such actions of the provisional government was reasonably swift and direct. If the southern legislatures, including Mississippi, were to reimpose slavery in another form, then the base of the electorate had to be radically altered. After the Civil Rights Act of 1866[32] had been followed by the Thirteenth Amendment, the foundation had been laid for the balance of the "Third American Constitution,"[33] the Fourteenth and Fifteenth Amendments, and the Civil Rights Acts of 1870, 1871 and 1875.[34] As a result of these enactments the formal legislative response to the war was largely complete.

Two essential points were made by this codification. First, that while the war had been fought in the name of the Union, the legal expression of victory was, not unexpectedly, couched in terms of equal humans rights, and — secondly — those rights received extensive and serious federal protection. The withdrawal of that protection as a matter of political expediency at the time of the Hayes-Tilden arrangement of 1877[35] cannot detract from the validity of its original content, or the effectiveness and necessity of its current meaning.

While the federal government turned away after 1890 from an interest in Negro rights, and was engaged in Asian wars, and the struggle in Cuba,[36] the state of Mis-

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[32]Act of April 9, 1866, chs. 31, 14, statute 27.

[33]See Franklin, *The Relation of the Fifth, Ninth and Fourteenth Amendments to the 3rd Constitution*, 4-5, *Howard Law Journal*, 171 (1958).

[34]1870; ch. 114; 16 Stat. 140: 1871; ch. 22, 17 Stat. 13: 1875; Act of March 1, 1875, Ch. 114, 18 Stat. 335, and Act of March 3, 1875, Ch. 137, 18 Stat. 470.

[35]See Woodward, *Reunion and Reaction* Doubleday-Anchor Ed. (1956).

[36]On this point see the effect of Imperialism in Asia described by Professor Woodward. "With the sections (North and South) in rapport, the work of writing the white man's law for Asia and Afro-America went forward simultaneously." *Origins of the New South*, Southern History Series, La. State Univ. Press, 1951, page 326.

sissippi, as ruled by the redeemers, was "responsible" to its sources of power. In the Constitution of 1890, Negroes were finally and effectively denied the franchise and thereby excluded from jury service. It is not coincidental that this document, containing a "grandfather" clause and "comprehension" requirements, similar to present franchise enactments,[37] followed *Rives* and preceded *Williams vs. Mississippi*.[38] By this time Negro registration was down in that state from a high in 1867 of 60,167 (46,636 for whites) to 8,615 (68,127 whites in 1892.[39]

The constitutional connection between the franchise and jury service has continued to this day[40] and serves as a vital link in the Mississippi plan of racial segregation.[41]

2) Mississippi was not so different from the other states of the old Confederacy that its experiences and response were unique. Certainly, these matters were in the mind of Congress when in 1866 it clearly stated that criminal prosecutions commenced in a state court may be removed to a federal forum when they were brought against:

"Any person who is denied . . . a right under any

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[37]Mississippi Constitution, Sections 243-244.

[38]170 U.S. 213 (1898).

[39]Wharton *op. cit.*, pp. 146 and 215.

[40]Mississippi Constitution Art. 14, Section 264; Mississippi code, Sections 1762 and 1766. See also *Goldsby vs. Harpole, op. cit.*

[41]For a good description of the Mississippi Plan see *Woodward, Origins of the New South*, Southern History Series. La. State Univ. Press, p. 321 (1951). This plan was widely copied by the other Southern States. (Woodward; *Reunion and Reaction, op. cit.* at p. 45). Another vital link was the "Atlanta Compromise" announced in 1895 by Booker T. Washington which confirmed the Negro abandonment of the Populists (who had earlier embarked upon the policy of uniting whites so as to allow them to divide). This policy not only recognized that 20 years of terror and opression had taken its toll, but practically invited the final disfranchisement of The Negro by assigning him a servile and humble role in the New South.

> law providing for the equal rights of citizens of the United States. . . ."

or against:

> "Any person who . . . cannot enforce in the courts of such state, a right under any law providing for the equal civil rights of citizens of the United States."

The above language does not appear in the statute in that exact form, but under the construction given Section 1443(1) by Judge Soboloff of the Fourth Circuit in his dissent from that Court's opinion in *Baines vs. Danville* (opinion, unreported, January 21st, 1966), the rendition is justified.

Petitioners have obviously alleged they cannot enforce the right to a trial jury impartially selected in the courts of Mississippi. While in the day of the *Rives* case federal and/or state procedure may have been inadequate to show jury selection discrimination in advance of trial, such is not true today. Adequate remedies exist in Federal courts under the rules of both civil and criminal procedure[42] to test the jury selection process. The argument that such a showing must not be "first made manifest at the trial of the case"[43] has no real meaning in modern times, since matters of jury composition are routinely taken up and made manifest well in advance of trial.

The statute as it stands today must allow removal when, in the light of experience in life and judicial history, the

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[42]Civil Rules Rule 7; Criminal Rules Rule 6(b)(2).
[43]Rives at p. 319.

allegations, if proven, would show the denial of a federally-protected equal right, or the inability to enforce such right at time of trial. In reality, there is no logical justification for the court below to say that these petitioners can remove because a statute, unconstitutionally enforced, denied them their equal civil rights by unfair arrest, and to say as well that they cannot remove when administrative exclusion of their race from the jury prevents them from being able to enforce in the state courts the "equal civil right" of "equal protection of the laws." It is indeed difficult for a person to conceive of such a difference or to avoid the conclusion that if *Peacock* is the law, then *Rives* and *Powers* should be overruled.

3) While it might be said that the *Rives-Powers* ruling avoids unnecessary federal-state conflicts and restricts the removal statute to prosecutions by states so naive as to explicitly — by statute — discriminate against Negroes in this day and age, this is to ignore not only life, but the requirements of federal law. In recent years Federal courts have largely abandoned state court review as the only method of exerting federal sovereignty. Sensing a growing indifference on the part of state governments to federal rights, and recognizing the primacy of the supremacy clause, the federal courts have not hesitated to step in on selected occasions to exert the power of the United States in defense of its citizens. This has occurred in matters of: reapportionment, (*Baker vs. Carr*, 369 U.S. 186 (1961) ; school prayer, (*Engel vs. Vitale*, 370 U.S. 421 (1962)); school desegregation, (*Brown vs. Board of Education*, 347 U.S. 483 (1954)); civil liberties, (*Dombrowski vs. Pfister* 380 U.S. 479 (1965)); and fair trial, (*Faye vs. Noia* 372 U.S. 391 (1963)). All of these cases have used extraordinary remedies (of in-

junction or habeas corpus) to supplement the traditional method of state-federal review. The court recognized in these instances the urgency and importance of immediate federal intervention to protect federal rights. That finding is equally justified in the removal cases here presented.

In this regard *Dombrowski vs. Pfister*, 380 U.S. 479 (1965) clearly held that where federal rights are in danger from state action the proper function of the federal courts is to interpose federal power between the individual citizen of the United States and the State:

> "When the statutes also have an over-broad sweep, as is here alleged, the hazard of loss or substantial impairment of those precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See *Baggett vs. Bullitt*, supra, at 379. For "the threat of sanctions may deter . . . almost as potently as the actual application of santions . . ." *NAACP vs. Button*, 371 U.S. 415, 433."[44]

The free speech First Amendment rights referred to in the *Dombrowski* opinion quoted above are no more

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[44]380 U.S. 479 at 486. See also dissenting opinion of Judge Wisdom in an earlier report in this case found at 227 F. Supp. 556 (1964) wherein he wrote: "Once more I emphasize that the basic error in the court's decision is its failure to distinguish between the type case now before it and the run of the mine suit by a criminal offender asking for relief against unlawful State action. In the Civil Rights Act Congress established a distinct federal cause of action in favor of those whose constitutional rights have been invaded. 42 U.S.C.A. Sections 1981, 1983, 1985. As a matter of law, since such cases involve a federal question, the right existed anyway. The fact that such cases involve a dispute over federally protected freedoms make the federal court the appropriate forum for settlement of the dispute."

precious and are no more federal in character than the Thirteenth, Fourteenth and Fifteenth Amendment rights made available for special protection by the civil rights removal statute. Title 28, Section 1443, does not allow the removal of all or even most criminal cases, and the jury selection interpretation sought here does not encompass procedural evils in jury selection which do not touch on the equal protection guarantees of the wartime amendments. This is not argued here. However, what is said now is that these amendments had one great aim — to bring the Negro up to the level of the white man and to use federal power to see that this was accomplished. This was why federal removal was vital to the true implementation of these amendments.

Here the petitioners seek, as did the Freedmens Bureau one hundred years ago, to raise the Negro up, to give him the vote and the education to use it. For this they were exposed to the wrath of the white Mississippi community which promptly set into motion the machinery of the state to suppress them. The facts of *Dombrowski* show the same sequence of events in Louisiana. As stated by Judge Wisdom in his District Court dissenting opinion in that case:

> "Chairman Pfister is quoted as saying that the plaintiffs were racial agitators. If that is true, and if the plaintiff's modest agitation by mail was motivated only by the plaintiff's interest in civil rights for Negroes then once again, as in *Bush vs. Orleans Parish School Board*, the State has marshalled the full force of its criminal law to enforce its social philosophy through the policeman's club.' Under any rational concept of federalism the federal district court has the primary responsibility and the duty to determine

> whether a state court proceeding is or is not a disguised effort to maintain the State's unyielding policy of segregation at the expense of the individual citizen's federally guaranteed rights and freedoms.[45]

Rives and *Powers* reflect no more than the removal counterpart of *Plessy vs. Ferguson.*[46] These ancient removal cases are judicial reflections of the Hayes-Tilden compromise withdrawing the previously given federal support of the Negro. This withdrawal was first signalled in the *Slaughterhouse* cases,[47] and consistently followed for seventy-five years. It was finally given its death blow in *Brown vs. Board of Education.*[48] *Rives* and *Powers* deserve the same fate.

4) Not only were these two removal cases historically wrong to begin with and now hopelessly out of date, but their reasoning is completely deficient as clearly set forth by the city itself in its application to this court where on page 16 it says:

> "Furthermore, City submits that there is no more reason for Congress to have believed that one would be denied his equal civil rights in the courts of the state because state officials allegedly arrested and charged him in violation of the equal protection clause than if state officials discriminated against him in violation of the equal protection clause in the selection of the grand and/or petit jurors."

Applicants would turn this argument on its head and say that there is as *much reason* for Congress to have believed that one would be denied his "equal civil rights" by a system of racially discriminatory jury selection as by a racially motivated arrest and charge.

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[45] *Dombrowski vs. Pfister*, 227 F. Supp. at p. 583.
[46] 163 U.S. 537, 41 L. Ed. 256, 16 S. Ct. 1138 (1896).
[47] 16 Wall; 36, 21 L. Ed. 394 (1873).
[48] 347 U.S. 483, 98 L. Ed. 873, 74 St. Ct. 686 (1954).

Clearly, Judge Bell, below, is hard put to follow the reasoning of *Rives* and *Powers*. He simply did the best possible job on this point while recognizing the inappropriateness of his Circuit Court's attempting to strike them down.

Judicial adminstration in that circuit has been sorely tried by the obstructionist effect of these *Plessy* type opinions. Clearly Negroes' rights are more effectively protected and the judicial process more properly and efficiently used if the equal protection problems posed by racially discriminatory jury selection systems are avoided in the first instance by the simple process of federal removal rather than by being dragged through the federal courts for years by the habeas corpus — appeal — certiorari method. Certainly the Fifth Circuit in its recent *en banc* hearing[49] was searching for something

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[49]In *Rives* the court recommended to the federal system the case-by-case method of federal review sanctiond by *Neal vs. Delaware*. This method has proved in practice to be unwieldy, expensive, and a burden to the docket. It has failed to produce substantial justice in circumstances of widespread disregard of federal rights. On December 16th and 17th 1965 the Court of Appeals for the Fifth Cricuit held an extraordinary *en banc* hearing covering seven jury discrimination cases. These appeals were selected from all over the circuit by virtue of their importance. These arguments were certainly in part designed to aid the court in its search for a solution to the problem posed to its docket by the mounting number of such cases. All five of the state cases were hapeas corpus appeals which relied on the *Neal* case, and the records therein clearly showed the consistency with which the requirements of the Fourteenth Amendment for impartially selected juries have been consistently disregarded in the Southern States. The cases heard were:
1*U. S. ex rel Edgar Labat vs. Bennett*, Dkt. No. 22218,
U. S. Court of Appeals, Fifth Circuit.
2*U. S. ex rel Edward Davis vs. Davis*, Dkt. No. 21926.
U. S. Court of Appeals, Fifth Circuit.
3*U. S. ex rel Andrew J. Scott vs. Walker*, Dkt. No. 20814,
U. S. Court of Appeals, Fifth Circuit.
4*Willie Brooks vs. Beto*, Dkt. No. 22809,
U. S. Court of Appeals, Fifth Circuit.
5*Joni Rabinowitz vs. U. S.*, Dkt. No. 21256,
U. S. Court of Appeals, Fifth Circuit.
6*Elixa Jackson, et al vs. U. S.*, Dkt. No. 21345,
U. S. Court of Appeals, Fifth Circuit.
7*Orzell Billingsley, Sr. vs. Clayton*, Dkt. No. 22304,
U. S. Court of Appeals, Fifth Circuit.

along these lines. Only this court can ultimately restore this vital federal right of equal protection in jury selection to the Negro people in an effective and efficient way. *Powers* and *Rives* should be overruled.

5) No only is the *Rives-Powers* doctrine a facet of *Plessy*, but it is another version of abstention in disguise. In reality, the doctrine was invented (and, given the legislative history of the removal statute and the realities of Reconstruction, there can be no other term) to return jurisdiction of the Negro back to the tender mercies of the states of the Old Confederacy. It was part and parcel of the meaning of the Hayes-Tilden compromise of 1877 and suffers today from all the defects inherent in the state activities and in-activities struck down by the new decisions limiting abstension.

The old abstention doctrine was too broad and was defective in at least two ways.[50] "1) it removes the federal courts from creative participation in the development of the law, and 2) it could cause the litigants great expense and delay." These important issues were all present in *Dombrowski vs. Pfister* 380 U.S. 479 (1965) and in the reapportionment cases beginning with *Baker vs. Carr*, 369 U.S. 186 (1962). Additionally, the great principal of having a federal forum and federal proection for federal rights, embodied in the federal removal statute, and extended by *Dombrowski* and *England*,[51] is abrogated by this *Rives-Powers* version of abstension. As stated in England:

"Abstention is a judge-fashioned vehicle for ac-

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[50]See Preuss, Note #8, 39 *Tulane Law Review* 577 at 579 (1965).
[51]*England vs. La. Bd. of Med. Examiners*, 375 U.S. 411 (1964).

cording appropriate deference to the 'respective competence of the state and federal court systems.' *Louisiana P. & L. Co. vs. Thibodaux*, 360 U.S. 25,29 79 S. Ct. 1070, 1073, 3 L. Ed. 2d 1058. Its recognition of the role of state courts as the final expositors of state law implies no disregard for the primacy of the federal judiciary in deciding questions of federal law.[32] Accordingly, we have on several occasions explicitly recognized that abstention does not, of course, invlove the abdication of federal jurisdiction, but only the postponement of its exercise. *Harrison vs. NAACP* 360 U.S. 167, 177. 79 S. Ct. 1025, 1030, 3 L. Ed. 2d 1152. . . ."

Shortly after the *England* decision this court decided *Dombrowski*, wherein it was held:

"We hold the abstention doctrine is inappropriate for cases such as the present one where, unlike *Douglas vs. City of Jeanette*,[33] statutes are justifiably attacked on their face as abridging free expression, or as applied for the purpose of discouraging protected activities."

This did no more than logically extend the principal that where a state statute is unconstitutionally vague, inhibiting of the exercise of First Amendment freedoms, and deterring constitutionally protected conduct, federal district courts may not abstain from adjudication and relief. *Cooper vs. Hutchinson* (1958 CA 3), 184 F. 2d 119; *Baggett vs. Bullitt*, 377 U.S. 360, 366, 367, 372, 12 L. Ed. 2d 377, 84 Sc. Ct. 1316; *Griffin vs. County School Board*, 377 U.S. 218, 12 L. Ed. 2d 256, 84 S. Ct. 1226; *Davis vs. Manu* 377 U.S. 678, 12 E. Ed. 2d 609, 84 S. Ct. 1458;

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[32]See Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 FRD 481, 487.

[33]319 U.S. 147, 63 S. Ct. 877, 87 L. Ed. 1324.

McNeese vs. Board of Education, 373 U.S. 668 10 L. Ed. 2d 622, 83 S. Ct. 1433.

In effect the Congress of 1866 in passing the federal removal section of the Civil Rights Act declared as a matter of national legislative policy that in the field of equal protection for Negroes, there was to be no doctrine of abstention, and that the federal equal civil rights were not to be subjected to state adjudication by the former slave-holding class. As to such rights, the extraordinary situations that must be present to overcome Section 2283[54] so that an injunction might issue (as in *Dombrowski)* are almost assumed to exist. In effect, the Congress, as shown in its debates, took legislative notice of the rebellious attitudes and defiant disregard by the Southern oligarchy of the equal civil rights of the Negro. This notice, as written into the law, recognizes not only state statutes as obstacles to enforcement of the Fourteenth Amendment, but also the actions of the officials, judges and sheriffs who enforce the law. Actually that Congress did the same thing the present Congress did when it passed the 1965 Voting Rights Bill.[55] After extensive hearings wherein the real scope of white suppression of the Negro voter was exposed, (almost without contradiction), Congress set about fashioning a remedy. In doing so it ignored the so-called state remedies and immediately invoked the Federal power in Federal forums. The Eighty-Ninth Congress found, and this court agreed, in *State of South Carolina vs. Katzenbach* (March 7, 1966 opinion) that "the latter strategem (. . . discriminatory *application* of voting test . . .)[56] is now the principal method used to

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[54] Title 28 Sec. 2283 U.S.C.
[55] 79 Stat. 437.
[56] Emphasis added.

bar Negroes from the polls." If the Eighty-Ninth Congress can find unconstitutional *application* of state voting laws the basis for Federal intervention and protection of Fourteenth Amendment voting rights, and if this court can agree with that Congress, then there is no reason why it cannot be said that the Thirty-Ninth Congress did not intend discriminatory application of a state jury system to justify Federal removal. Finally, there is no reason why this court should not agree with such policy as set forth in *South Carolina vs. Katzenbach.*

B. THE STATUTES ARE UNCONSTITUTIONAL.

1) Given the state of the Mississippi jury selection statutes, it is difficult to conclude that this system does not fall prey to even a loose reading of *Rives* and *Powers.*

Those laws in their pertinent parts read as follows:

Mississippi Constitution Art. 14 Section 264:

"No person shall be a grand or petit juror unless a qualified elector . . . The Legislature shall provide by law for procuring a list of persons so qualified . . ."

Mississippi Code Section 1762:

"Every *Male* citizen not under the age of Twenty-One years who is a qualified elector . . . is a competent juror . . ." [emphasis added]

Mississippi Code Section 1766:

"The Board of supervisors . . . shall select and make a list of persons to serve as jurors in the circuit court . . . as a guide in making the list

they shall use the registration book of voters, and shall select and list the names of qualified persons of good intelligence, sound judgment, and fair character . . ."

Mississippi Code Section 1796:

"A challenge to the array shall not be sustained, except for fraud, nor shall any venire facias except a special venire facias in a criminal case, be quashed for any cause whatever."

Mississippi Code Section 1798:

"All the provisions of law in relation to the listing, drawing, summoning and impaneling juries are directory merely; and a jury listed drawn, summoned or impainel, though in an informal or irregular manner, shall be deemed a legal jury . . ."

If the state statutes in West Virginia excluded Negroes from jury service, the formal Mississippi jury structure does no less. The entire machinery of juror selection in that State is geared to literate voter registration. This scheme was deliberately contrived in 1890 when it was apparent that while Negroes composed nearly one-half of the electorate, almost four-fifths of them were unable to read and write. Compared to this, only one-quarter of the whites suffered from such disability. The solution was obvious:[57] given the guiding principal of white supremacy, the redeemers of the State simply drew the Constitution of 1890 so as to require literacy tests of electors which Negroes could not meet.[58]

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[57]Wharton, op. *cit.*, page 201 writes: "By 1890 Mississippi's Democratic Congressmen were ready to give enthusiastic support to any scheme that would put a legal face on the elimination of the Negro vote."

[58]For a brief but careful description of this device, see *U.S. vs. Mississippi* 85, S. Ct. 808, 380 U.S. 128 (1965).

The second Mississippi plan worked for nearly 65 years, but in 1954, sensing that *Brown vs. Board of Education* signaled a revived federal interest in the Negro, and reading clearly the caveat of the Court of Appeals for the Fifth Circuit in *Peay vs. Cox*, 190 F. 2d. 128,[59] the State tightened the constitutional disenfranchisement of the Negro. The Reconstruction Congresses had struck at the heart of the Southern problem in 1866, 1870, 1871 and 1875. That lesson was not lost on Mississippi. The rule now was that the Negro voter, and hence the juror, must not, as before, be able only to read *or* understand *or* interpret a 167-page constitution, but he now had to read *and* understand *and* interpret this amazing document.[60] Feeling that this was not enough, in 1960 the legislature with the help of the selected electorate that held the vote, added the requirement that voters should be of "good character."[61]

The federal concern though very late, was justified: Negro voter registration had dropped from 50% in 1890, to 9% in 1899, and then to 5% in 1954. Of course, this was due to the successful operation of the plan, but at this point the state became the victim of its own success. The Justice Department stepped in and brought suit to expose the scheme.

Mr. Justice Black, for this Court, wrote in *U.S. vs. Mississippi:*

> "It is apparent that the complaint which the majority of the District Court dismissed, charged a long standing, carefully prepared, and faithfully observed plan to bar Negroes from voting in the State of Mississippi, a plan which the reg-

[59]Cert. Denied 342 U.S. 896.
[60]Sec. 244 of the Mississippi Constitution.
[61]Sec. 241-A of the Mississippi Constitution.

istration statistics included in the complaint would seem to show had been remarkably successful."

Taken as a whole, the scheme to eliminate the Negro from the jury box was just as successful. When one construes the unconstitutional provisions of the Mississippi voter and juror selection statutes together (i.e., as they are written) to the same provisions of the Louisiana Laws now found unconstitutional in *U.S. vs. Louisiana*,[83] the conclusion should be that the entire disreputable and concocted affair should be brought tumbling down.

2.) It should be noted here that one of the grounds specifically relied upon in the *Weathers* petitions as grounds for removal is that the entire legal structure which will conduct petitioners trials, is operated by a sheriff, a district attorney and a judge put in office by an election from which Negroes were systematically excluded.[85] Leflore County is a defendant in a pattern and practice suit,[84] and its registrar is one of those sought to be restrained in *U.S. vs. Mississippi*, 85 S. Ct. 808, 380 U.S. 128. The Fifth Circuit has just set aside municipal elections in the case of *Hamer vs. Sunflower* (script opinion March 11th, 1966, unreported) where a pattern and practice finding so closely preceeded an elec-

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[83] 380 U.S. 128 85 S. Ct. 808 (1965). The South Carolina plan pushed by Governor Tillman, as described by Justice Black in his opinion in *U.S. vs. Mississippi*, was but an imitation of the second Mississippi plan of 1890. See Woodward, *Origins of the New South*, *op. cit.*, p. 322. It should be noted that the 1890 plan was as much directed against the growing Populist movement which drew its support from the illiterate whites as against the Negro. By 1898, *Williams vs. Mississippi*, 170 U.S. 213 had placed the stamp of Federal approval on the whole sinister conspiracy.

[84] R. 40 (C, 2,) e).

[85] *U.S. vs. Mississippi*, 229 F. 2d 679.

tion that Negroes made eligible by the Federal Court[65] had no time to register or qualify as candidates. It stands to reason that these county officials, who initiated this arrest in the first place, and who can easily be said, and probably shown, to be participants in the Mississippi Plan, were not, are not, and cannot be racially impartial. It will be most difficult if not impossible for petitioners who have already been denied equal protection from the sheriff to receive it from the prosecutor and the judge.

By the explicit exclusion of women by Mississippi Code Section 1762, the structure of jury selection in that state clearly becomes unconstitutional. A three judge Federal Court in the Middle District of Alabama recently held, in *(White et. al vs. Crook et al.*, Docket #2263-N Mid. Dist. Ala. North. Div., undeported opinion Feb. 7th, 1966) that the Alabama statute that excluded women from jury service is unconstitutional. Dorothy Weathers is a female.[66] There is no more reason for allowing women to be excluded from juries than there is for excluding Negroes. If, for no other reason, the removal petitions should be sustained on this ground. This is the least *Rives* and *Powers* can do for this generation.

3.) Finally, after reading Code Sections 1796 and 1798, it is difficult to believe that Mississippi has a jury selection system worthy of the name. The provisions sound as though designed for the western territories or the Yukon near the turn of the century. Apparently, the Mississippi Court can not only justify and legally protect any array of jurymen,[67] but can, in a pinch, draw the

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[65]*U.S. vs. Campbell*, ND Miss. No. GC633 (1965 unreported) (Covering Sunflower County, which adjoins LeFlore).
[66]R. 47.
[67]Miss. Code,Section 1796.

jury as it sees fit.[68] While this might be necessary or even through serendipity, impartial in some instances, it renders a formal examination of method, as well as results, impossible.

With such statutes still on the books and available, the standard of *Rives* and *Powers* is not only met, it is exceeded. Obviously, if no one can test the array on a racial basis, and if all formalities are waived by law, then there is no use even mentioning the troublesome problem of equal protection, much less due process of law. To apply strictly the formalism of *Rives* and *Powers* would be to assign such a system to the eighteenth century where it belongs.

III

CIVIL RIGHTS WORKERS ARRESTED AND CHARGED BY THE STATE WHILE ASSISTING NEGROES TO REGISTER TO VOTE IN MISSISSIPPI ARE THEREBY PROSECUTED FOR AN ACT PERFORMED UNDER COLOR OF AUTHORITY DERIVED FROM THE FOURTEENTH AMENDMENT AND THE CIVIL RIGHTS ACTS OF 1957 AND 1960, AND ADDITIONALLY FOR REFUSING TO DO AN ACT, i.e., FOR DESISTING, ON THE GROUND THAT IT WOULD BE INCONSISTENT WITH SUCH EQUAL FEDERAL LAWS, ALL WITHIN THE MEANING OF SECTION 1443(2).

A) Until *People vs. Galamison*, 342 F. 2d 255 (1965) and *Peacock* were decided, there were no appellate decisions that gave a judicial interpretation to 28 USC 1443(2). In *Galamison* the petitioners relied on 42 USC

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[68] Miss. Code, Section 1798.

1981 and the due process clause of the Fourteenth Amendment. In the *Peacock* case, however, petitioners were not seeking due process, but equal protection of the laws. They were assisting others to register to vote. It was the avowed public policy of the Federal Government all over the South, and particularly in LeFlore County, Mississippi, that Negroes not only be allowed, but encouraged to vote. That is what all the agitation has been about, since at least the 1957 Civil Rights Act. The Justice Department of the Federal Government under the 1957 act and under the 1960 act had not only sued to destroy the "Mississippi Plan" of 1890 and had named the LeFlore County registrar as a defendant,[69] but had, under the discretionary and quasi-judicial powers granted the Attorney General in those Statutes, and based on an exhaustive investigation, determined that there existed a pattern and practice of racial discrimination in voting in LeFlore and other Counties. The Attorney General had, in fact just before these arrests, brought suit for a judgment declaring such a pattern and practice to exist and for an injunction against the registrar of voters along with a request for other equitable relief. That case, *U. S. vs. Mississippi, et al*, 339 F. 2d 679, was designed to result in an appropriate freezing order. Petitioners as civil rights workers, would clearly play a prominent part in the implementation of that order. Those cases were not the only Justice Department activity in support of the Student Non-Violent Coordinating Committee which had early established its Mississippi base in Greenwood. Just two years before, (1961) a civil rights worker for SNCC had been pistol-whipped in the courthouse by the registrar of voters, and the Justice

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[69] *U.S. vs. Mississippi*, 380 U.S. 128, S. Ct. 128 (229 F. Supp. 925).

Department had sought an injunction to protect the voter registration drive then in progress there; *US vs. Wood* 295 F. 2d 772 (1964). If any group of persons were ever members of a "posse comitatus," Willie Peacock and his SNCC co-workers were.

After the Hardy incident of the *Wood* case, it became plain that the rural Mississippi Negro not only had to suppress a lifetime of fear and terror to even appear at the "white man's courthouse", he had to be downright foolhardy to do so for the purpose of voter registration. The lesson was clear. Unless he had someone to encourage him to even go to the Courthouse, and a person he trusted, brave enough to accompany him there, he simply would not go. That is what these petitioners were trying to do when arrested. A person would be nearly blind not to see that these petitioners, who do not work for pay, were doing the work our Federal Government was encouraging and assisting them to do. By helping others in the exercise of the substantive right to non-discriminatory voter registration they acquired a "color of authority" as defined by 28 USC Section 1443(2). To require them to qualify for removal under Sections 1443(1), is to ignore history and current reality. They are no less than the modern counterpart of the unpaid volunteers that assisted the Freedmans Bureau of 100 years ago. Their protection then was in large measure the basis for the language of Section 1443(2), and it should be no less so today.

B) Curiously, no mention is made in either *Galamison* or *Peacock* below, of the last part of subsection (2). We deem that language to be most significant. Professor

Amsterdam in his work on this subject[70] refers to the language of Section 1443 as being couched in terms of "exquisite obscurity". This may be so, but a careful reading of Southern History serves to remove some of that obscurity. Historical responses such as the Civil Rights Acts of the Reconstruction period are not without their historical reasons. Professor Amsterdam's brief in the *Rachel* case is evidence of that. Additionally, just as these matters cannot be considered from a purely analytical viewpoint, they must be assumed to have a reason for existence. The second part of subparagraph (2)of Section 1443 is there for a purpose, and that purpose gives support to the position previously urged here, and in *Rachel*, that Section 1443(2) applies to "persons," generally. The language in question is:

> ". . . or for refusing to do any act on the ground that it would be inconsistent with such law."[71]

This might be said to apply to the federal officer under mandatory State injunction to strike a Negro from a voter roll or to alter a land ownership book, but such instances were certainly rare after 1865 when the occupational commanders had returned most such duties to the Southern Whites. What this language really means is that the individual Negro, who was registered, listed, worked, bartered for, paid and indentured under the Black Codes, could remove his case when he was prose-

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[70]*Criminal Prosecutions Affecting Federally Guaranteed Civil Rights; Federal Removal and Heabeas Corpus Jurisdiction to Abort State Court Trial*, 113 Univ. of Pennsylvania Law Review, 793, (1965).

[71]This language was amended into Senate Bill #61 on March 15th 1866 after conference. In Senator Trumbulls report (*Cong. Globe* p. 1413, 39th Cong.) he directly relates it to the protection being given by law to Freedmen and Refugees.

cuted for violating them. These laws were the heart and soul of the Provisional Government of Mississippi in 1865, the year before the removal Statute was passed.[72] They were not repealed there until 1867.[73] They were in turn, however, replaced by the vagrancy laws and Statutes which required freedmen without a yearly labor contract to secure a license.[74]

Additionally Negroes were required by law to apprentice their minor children under pain of severe penalties.[75] This act was written explicitly for and applied to the children of Negroes only.

Wharton in his work,[76] at page 84 writes:

> ". . . it cannot be denied that county courts by arbitrary decisions as to the ability of the freedmen to provide for their children might easily have delivered most of the Negro minors into the hands of their former masters."

Negroes over eighteen years old were, under the second series of Black Codes, required to have homes and to find lawful employment by the . . . "Second Monday in January, 1866 . . ." or be deemed a vagrant.[77] Negroes

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[72]Trumbull further describes the removal act at page 474 of the *Globe* on January 29th 1866:

> "Since the abolition of slavery the Legislatures which have assembled in the insurrectionary states have passed Laws relating to the Freedmen and in nearly all of the states they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations . . ."

[73]Notes Nos. 29 and 30 supra.

[74]Wharton, op cite, p. 91.

[75]Mississippi Session Laws Regular Session, 1865, § 86-90 (November 22, 1865).

[76]Op. cite.

[77]Mississippi Session Laws, op. cite. § 90-93.

were also by the codes required to pay a . . ." capitation tax not to exceed one dollar annually, on each and every freedman, free Negro, or mulatto . . ." for the support of the Negro paupers.[78]

Finally Negroes were required to have written evidence of employment, i.e. a labor contract, on or before the second Monday in January, 1866 or be deemed a vagrant.[79] Considering these requirements of the Black Codes all together, it is difficult to recall any other set of laws more inconsistent with the Fourteenth Amendment except the slave codes themselves.

The refusal to do these acts of indentur, apprenticement, registration or payment a head tax were naturally widespread among the hundreds of thousands of newly freed slaves who were without jobs, cash or the rudiments of an education. These people did not only refuse to perform, they simply could not, and the white supremacists knew it. That was why they drew the Black Codes the way they did. This was the first "Mississippi Plan", and that is why the last part of Subsection 2 of § 1443 seems, but is not, "exquisitely obscure."

This part of Subsection (2) of § 1443 can then be said historically, to apply to the great masses of freed Negro slaves, wandering about the South in the aftermath of a great civil war, who like the children of Israel were being herded, prosecuted and impressed by their former masters. This removal was to be their individual relief. This law was designed to lift the burden of the

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[78] *Wharton*, op. cite, p. 85.
[79] *Wharton*, op. cite, p. 87. See also the speech by Senator Donnelly (*Cong. Globe* 2/1/66 p. 588, 39th Congress) wherein he gives a detailed and moving description of the plight of the freedman and carefully describes the slave-like character of the Black Codes.

thousands of petty charges descending upon them from the white power structure like a plague of locusts. These are the prosecutions this language was designed to stop.

The same is true, in a modern context, in this case. These petitioners refused to move on, refused to conform to the hundreds of petty harassments of daily life in Mississippi, and finally and most importantly, refused to desist from assisting in voter registration drives among Negroes because such an act would be inconsistent with the clear provisions of the Fourteenth Amendment, The Civil Rights Acts of 1957 and 1960, and their own commitment of conscience thereto.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed in part and reversed in part.

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CERTIFICATE

Undersigned Counsel certifies that he has served a copy of the above brief on Mr. Hardy Lott of Lott and Saunders, Counsel for the City of Greenwood by placing same in the U.S. Mail postage prepaid this _____ day of March 1966.

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